

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 23 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JACKIE EUGENE DAVIS,

Appellant.

)
)
) 2 CA-CR 2005-0379
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041844

Honorable Ted B. Borek, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Jackie Davis guilty of five counts of sale of a narcotic drug. The jury also found he had three prior felony convictions and had been on parole when he committed the offenses.¹ The trial court sentenced Davis to concurrent, partially

¹Contrary to the state's assertion, the jury found that Davis has three prior felony convictions, not four. The fourth entry on the verdict form was the basis for the jury's

mitigated prison terms of fourteen years on each conviction. On appeal, he contends the trial court erred in denying his motion to sever the counts for trial and in imposing enhanced sentences. We affirm his convictions.

¶2 We do not address Davis’s argument about the court’s refusal to sever the counts for trial. As the state points out, although Davis moved before trial to sever the counts, he did not renew the motion during trial. Accordingly, he waived the issue on appeal. *See* Ariz. R. Crim. P. 13.4(c), 16A A.R.S.

¶3 We find no merit to Davis’s second argument—that the trial court improperly imposed enhanced sentences pursuant to A.R.S. § 13-604 although the jury found only that he had prior felony convictions without finding the date they were committed. As a result, Davis contends, the prior convictions cannot constitute historical prior felony convictions under former § 13-604(V)(2), now (W)(2). *See* 2003 Ariz. Sess. Laws, ch. 11, § 1; 2005 Ariz. Sess. Laws, ch. 188, § 1. We disagree.

¶4 As Davis acknowledges, his attorney did not object to imposition of the enhanced sentences; accordingly, we review the issue only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Therefore, Davis must show both that error occurred and that the error is prejudicial. *See id.* Davis is correct that the verdict form on the prior convictions did not include a date the prior offenses were committed. But that form did include the name of the county in which the conviction was entered as well as the cause number. And the state presented as evidence a certified copy

finding that Davis was on parole for one of those prior convictions at the time he committed the present offenses.

of the Department of Corrections record that contains both the dates the offenses were committed and the dates he was sentenced for the convictions. Davis did not challenge any aspect of the prison records during the aggravation hearing. Therefore, the state's evidence connecting the dates the prior offenses were committed with the county name and cause number of the prior convictions was the only evidence the jury had.

¶5 We disagree with Davis's assertion that the jury was required to expressly find the prior convictions constituted historical prior felony convictions under § 13-604(W)(2). As Davis notes, § 13-604(P) provides that only the court may find that prior convictions constitute historical prior felony convictions. That determination requires the court to apply the statutory provisions to the facts of the prior convictions. The court made the required findings about those convictions in its sentencing minute entry. Finally, because two of the three prior convictions unequivocally fall within the provisions of § 13-604(W)(2)(c) and because the maximum enhanced sentence requires only two prior convictions, it is irrelevant whether Davis's oldest prior conviction met the statutory requirements. *See* § 13-604(C) and (D). We find no fundamental error.

¶6 Davis's convictions and sentences are affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge